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ABSTRACT

This article advances the view that constitutional doctrine now requires schools to provide instruction in the native tongue of non-English-speaking children until they have learned English. It will be argued that equality of educational opportunity, and hence equal protection, does not exist when the instruction provided by the state is incomprehensible to identifiable groups of children, and that to compel attendance under these conditions is a deprivation of liberty without due process of law. Before these two constitutional issues are dealt with in Parts 4 and 5, the factual and legal background of the problem is discussed in Part 1, and the statutory and state constitutional provisions lending support for affirmative judicial action are reviewed in Parts 2 and 3. (Author/KM)

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BREAKING THE LANGUAGE BARRIER: THE RIGHT TO BILINGUAL EDUCATION*

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> These . . . children are not separated from their English-speaking classmates by . . . walls of brick and mortar, but [by] the language barrier . . . .[1]

Decisions in the field of education have frequently paced the expansion of judicial protection for human rights through this century. The rights of blacks under the equal protection clause, for example, had long been governed by an 1896 case concerning segregated public transportation. In that case the Supreme Court rejected the proposition that "the enforced separation of the two races stamps the colored race with a badge of inferiority,"[2] and declined to rule that de jure segregation denied equal protection of the law. Cases broadening the concept of equal educational opportunity reversed this failure to recognize social and economic realities in equal protection decisions.[3] In addition, application of the due process clause has grown increasingly sensitive to societal barriers confronting the individual, and here too the Court has paid special attention to the impact of educational institutions on children.[4] As early as 1923, it struck down a restriction on the teaching of modern foreign languages as an infringement of the liberty "to acquire useful knowledge."[5] The Court's sensitivity to social conditions in the schoolhouse has been followed and reinforced by concern over the consequences of state activities for disadvantaged citizens in other areas.[6]

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*As this Article went to press, the appellate decision in the *Lau v. Nichols* case—discussed at pp. 58–60 *infra*—was reversed by the Supreme Court and the case was remanded for the fashioning of appropriate relief. 42 U.S.L.W. 4165 (U.S. Jan. 22, 1974). The Court relied solely on the statutory grounds discussed at pp. 62–63 *infra*, and it gave no indication of what remedy is required or how it is to be enforced—by termination of funding or otherwise.

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[1] Lau v. Nichols, 483 F.2d 805, 806 (9th Cir. 1973) (Hufstedler, J., dissenting from denial of rehearing en banc).

[2] Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

[3] *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) (racially separate schools are inherently unequal); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (required separation by race within classroom, library, and cafeteria is impermissible).

[4] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (religion); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (speech); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (liberty to direct the upbringing and education of children).

[5] Meyer v. Nebraska, 262 U.S. 390, 399 (1923); *see* p. 88 *infra*.

[6] *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971) (due process requires waiving court fees for indigent plaintiffs seeking divorce); Miranda v. Arizona, 384 U.S. 436 (1966)

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This Article will advance the view that as a result of these developments constitutional doctrine now requires schools to provide instruction in the native tongue of non-English speaking children until they have learned English. It will be argued that equality of educational opportunity—and hence equal protection—does not exist when the instruction provided by the state is incomprehensible to identifiable groups of children, and that to compel attendance under these conditions is a deprivation of liberty without due process of law. Before these two constitutional issues are dealt with in Parts IV and V, the factual and legal background of the problem will be discussed in Part I, and the statutory and state constitutional provisions lending support for affirmative judicial action will be reviewed in Parts II and III.

I. FACTUAL AND LEGAL BACKGROUND

A. The Consequences of English-only Education

Over five million school-age children in this country come from non-English speaking homes.[7] Yet according to the United States Office of Education, only 112,000 (2.2 percent) of them are receiving assistance in learning English through bilingual programs.[8] The rest are thrust into

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(a person held in custody must be effectively advised of the privilege against self-incrimination); Griffin v. Illinois, 351 U.S. 12 (1956) (equal protection requires waiving fee for trial transcript necessary to appeal). *But see* United States v. Kras, 409 U.S. 434 (1973) (bankruptcy fee provisions deny indigents neither due process nor equal protection).

[7] Office of Education, U.S. Dep't of HEW, Draft: Five Year Plan 1972–77: Bilingual Education Programs, App. B, Aug. 24, 1971. *See also* Wall St. J., Dec. 15, 1972, at 1, col. 1.

[8] Only 217 bilingual projects were funded for fiscal year 1972 under Title VII of the Elementary and Secondary Education Act of 1965 (ESEA). 20 U.S.C. §§ 880b—880b-4 (1970), *as amended*, 20 U.S.C.A. §§ 880b-1, 880b-3a, 880b-4 (Pocket Part 1973). They reached about one out of every forty pupils needing such instruction and meeting the legislative criteria. Office of Education, U.S. Dep't of HEW, ESEA Title VII Project Summary, at 1, Sept. 1972 (by state and project location, giving 1972 grant award and cumulative total) (unpublished report, made available by Margaret Van Naersson, Program Officer, Division of Bilingual Education, U.S. Office of Education). Title VII grants to local school systems amounted to $33.1 million in 1972 and the cumulative funding from 1969 through 1972 was $86.3 million. Twenty-nine states and four territories conduct bilingual classes under the aegis of Title VII. *Id. passim.*

Despite the apparent generosity of legislative appropriations, it should be noted that most bilingual instruction is offered in small, scattered pilot programs. In three states—Arizona, Colorado, and New Mexico—less than one percent of the Mexican-American student population participate in bilingual programs; in neighboring California and Texas, the figures are 1.7 percent and 5.0 percent respectively. U.S. Comm'n on Civil Rights, *The*

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classrooms where they cannot absorb the lessons or assimilate the most basic of skills.[9]

That non-English speaking children cannot derive educational benefits from incomprehensible instruction is apparent from the statistical results of a study made in the Southwest. Almost 16 percent of the Mexican-American pupils surveyed repeated first grade in 1969. The same study revealed that only 6 percent of Anglo students and 8.9 percent of blacks repeated this grade. Grade repetition figures for fourth grade were 3.4 percent for Mexican-Americans, 1.6 percent for Anglos, and 1.8 percent for blacks.[10] Predictably, a much greater proportion of Chicano pupils were two or more years overage for their grades than were Anglos or blacks. Of the total number of Chicanos, 3.5 percent were overage in first grade, 6.9 percent in fourth, 9.4 percent in eighth, and 5.5 percent in twelfth. The comparable figures for black students were 1.2 percent in the first grade, 1.8 percent in fourth, 2.1 percent in eighth, and 4.4 percent in twelfth; and for Anglo students the statistics were 0.8 percent in first grade, 1.0 percent in fourth, 1.2 percent in eighth, and 1.4 percent in twelfth.[11] Dropout rates demonstrate that public schools

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Excluded Student, REPORT III, MEXICAN AMERICAN EDUCATION STUDY 22 (May 1972) [hereinafter cited as REPORT III]. Some money from Title I (ESEA), 20 U.S.C. § 241a (1970), *as amended*, 20 U.S.C.A. § 241a (Pocket Part 1973), state appropriations, and the Bureau of Indian Affairs also reaches bilingual programs. Telephone interview with Ronald Hall, Specialist in the Dep't of Compensatory Education, Office of Education, U.S. Dep't of HEW, Jan. 4, 1973. However, as a result of decentralized decision-making, the United States Office of Education has no overall data on the amount of funding from these sources. The one exception is Title I funding of projects for migrant children, since that program is administered from Washington, D.C. For an overview and evaluation of the Title I Migrant Program with a suggested statute for reform, see Comment, *Strengthening the Title I Migrant Education Program*, 10 HARV. J. LEGIS. 41 (1972). Although $1.6 billion in Title I appropriations go to over 14,000 school districts each year, Title I officials concede that the "true" bilingual projects are funded under Title VII. Title I funds either supplement Title VII projects or facilitate programs of lesser scope. Telephone interview with Ronald Hall, *supra*.

[9]Despite legislative encouragement of programs for non-English speaking students, a recent survey by the United States Commission on Civil Rights showed that unenlightened attitudes persist among school officials in the Southwest. REPORT III, *supra* note 8. It provided evidence, for example, that the use of Spanish in class or on school premises is substantially discouraged and sometimes officially prohibited. *Id.* at 14–16. *See also* Kobrick, *A Model Act Providing for Transitional Bilingual Education Programs in Public Schools*, 9 HARV. J. LEGIS. 260, 264 (1972) [hereinafter cited as Kobrick]. As recently as October of 1970, a Texas high school teacher was indicted for conducting his class in Spanish. REPORT III, *supra* note 8, at 82. Most districts rely on less stringent means to enforce "No-Spanish" rules. *Id.* at 18.

[10]U.S. Comm'n on Civil Rights, *The Unfinished Education*, REPORT II, MEXICAN AMERICAN EDUCATION STUDY 35 (Oct. 1971).

[11]*Id.* at 37.

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have less holding power for Chicanos than for the other two groups. Of all Mexican-American pupils, 9 percent dropped out by eighth grade, and 40 percent by twelfth grade; the figures for blacks were 1.5 percent and 33 percent respectively.[12] Similar patterns exist for non-English speaking ethnic groups outside the Southwest.[13]

These problems of poor performance and non-attendance[14] are not attributable solely to the language barrier, but there is an interrelationship between that hurdle and other disadvantages faced by non-English speaking children. A uniform characteristic of such children is "self-derogation," and its correlation with low school achievement makes it difficult to distinguish between causes and effects.[15] The conventional wisdom has been summed up as follows:

> Growing up in a family that has inherited the cycles of poverty, living in an environment that includes failure, being rejected by society, and being confronted with his

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[12] *Id.* at 11.

[13] In New York City, 170,000 Spanish-speaking children—predominantly Puerto Rican—attend public schools. Nine out of ten possess reading skills well below their grade level, and six out of ten who enter high school drop out before graduation. Yet only 4,000 currently participate in bilingual programs. Wall St. J., Dec. 15, 1972, at 1, col. 1. *See also* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 2, Aspira, Inc. v. Board of Educ., No. 72 Civ. 4002 MEF (S.D.N.Y., filed Sept. 20, 1972), *motion to dismiss denied*, 58 F.R.D. 62 (S.D.N.Y. 1973). Other estimates of the number of Puerto Rican children in New York City public schools are larger. For example, Kobrick estimated the number at 250,000. Kobrick, *supra* note 9, at 261.

Similar statistics obtain for San Francisco's Chinese-speaking population. Lau v. Nichols, Civil No. C-70, 627 LHB (N.D. Cal., May 26, 1970), *aff'd*, 483 F.2d 791 (9th Cir.), *rehearing en banc denied*, 483 F.2d 805, *cert. granted*, 93 S. Ct. 2786 (1973). Although a 1969 survey by school officials estimated that 2,856 Chinese-speaking pupils needed special instruction in English, defendants admitted that two-thirds of them did not receive it. The others—supposedly getting "bilingual" instruction—either received "English as a Second Language" instruction, *see* pp. 56–57 *infra*, or instruction by untrained classroom teachers, parents, or volunteers for an hour a day. Plaintiffs' Memorandum of Law in Support of a Preliminary Injunction at 3, 15, Lau v. Nichols, Civil No. C-70, 627 LHB (N.D. Cal., May 26, 1970).

For an article on all phases of Indian education, see Rosenfelt, *Indian School and Community Control*, 25 STAN. L. REV. 489 (1973) [hereinafter cited as Rosenfelt].

[14] It is important to realize that thousands of non-English speaking youngsters never attend school. The figures are extremely difficult to collect. Door-to-door canvassing of individual households is necessary, and this method is feasible only for small samples. In one such survey it was discovered that sixty-five percent of the Spanish-speaking children in a ten-block area of Boston had never even registered. Kobrick, *supra* note 9, at 261. The situation is particularly serious in areas with large numbers of migrant workers, where local school officials, parents, and employers have an interest in putting children to work. The Title I Migrant Education Program has alleviated some problems. *See* note 8 *supra*.

[15] T. Carter, MEXICAN AMERICANS IN SCHOOL: A HISTORY OF EDUCATIONAL NEGLECT 53 (1970) [hereinafter cited as Carter].

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> own inadequacies in the school—in other words, possessing all the "bad things" of our society—the disadvantaged pupil learns to look upon himself with contempt. Furthermore, his negative attitude of himself is continually reinforced.[16]

The language barrier in school is one strong reinforcing element, for "[i]f . . . the all-powerful school . . . rejects the mother-tongue of an entire group of children, it can be expected to affect seriously and adversely those children's concept of their parents, their homes, and of themselves."[17]

"Bilingual" education programs are a response to this dismal record. In this approach, a child who speaks little or no English starts learning in the language he knows best. Instruction in English gradually increases until the child masters both languages.[18]

The rationale of bilingual education is threefold. Its minimum contribution is ensuring that the children learn the subject matter being taught. More importantly, it facilitates the teaching of *English* so that instruction may ultimately proceed in that language. Linguistic anthropologists have known for many years that children reared in one linguistic environment who learn to read in their native tongue first subsequently do better work in a second language than those who must cope with it immediately upon entering school.[19] Finally, bilingual teaching is considered by educational theorists as "a means toward the development of a harmonious and positive self-image."[20] It thus helps to preserve the children's sense of self-worth and prevent destruction of their interest in schooling at the outset.

It is important to emphasize the inadequacy of the most frequently posed alternative to bilingual education: English as a Second Language (ESL). ESL relies on instruction in English for all but a few hours per week and is ineffective because it fails to utilize ability or conceptual

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[16] *Id.* at 54, *quoting* K. Johnson, TEACHING THE CULTURALLY DISADVANTAGED PUPIL (1966).

[17] *Hearings on S. 428 Before the Special Subcomm. on Bilingual Education of the Senate Comm. of Labor and Public Welfare*, 90th Cong., 1st Sess., at 52 (1967) (statement of A. Bruce Gaarder) [hereinafter cited as *Bilingual Hearings*].

[18] This definition is adapted from an article in the Wall Street Journal, Dec. 15, 1972, at 1, col. 1.

[19] *See generally* testimony of A. Bruce Gaarder, Chief, Modern Foreign Language Section, United States Office of Education, in *Bilingual Hearings, supra* note 17, at 46–59.

[20] John, Horner, & Socolov, *American Voices*, 4 THE CENTER FORUM 3 (1969) (published by Center for Urban Education, a Regional Education Lab of the Office of Education). *See also* Kobrick, *supra* note 9.

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development in a native language.[21] It is nonetheless attractive to school administrators because it requires little change in curricula and less teacher-training than is needed for bilingual teaching. Stated differently, ESL programs are less effective for non-English speaking children, but cheaper and easier to develop. Furthermore, the consensus of linguistic specialists is that a second language should be learned in the same sequence as the first one: hearing, understanding, and speaking first; *then* reading and writing.[22] Some ESL programs therefore actually exacerbate the students' problems. The logical sequence of assimilating the children's own tongue is disrupted—since most ESL curricula practically exclude native languages—and at the same time the children are thrust into the English sequence without ever assimilating *its* earlier stages. The most pernicious effect is that they are often illiterate in both languages.[23]

While other compensatory educational programs have been criticized in such studies as the Coleman Report,[24] there is little dissent from the proposition that bilingual programs work and that participating students learn more effectively than those in English-only classes.[25]

Disregard for the affirmative role that bilingualism can play in learning is ironic in light of the country's otherwise grand commitment to foreign language instruction.[26] It is inconsistent to devote so much attention to developing the language skills of English-speaking students while dismissing the native competence of non-English speaking children.

The policies in favor of bilingual education are clear. Over the past decade they have been recognized in cogent legislative and administrative pronouncements,[27] and they are now being called to the attention of courts.

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[21]ESL therefore fails to tap an existing educational resource. Educators "have come to agree that the best medium, especially for the initial stages of a child's learning, is his dominant language." T. Andersson & M. Boyer, 1 BILINGUAL SCHOOLING IN THE UNITED STATES 44 (1970) [hereinafter cited as Andersson & Boyer].

[22]Kobrick, *supra* note 9, at 266.

[23]*See Bilingual Hearings*, *supra* note 17, at 54–55 (statement of A. Bruce Gaarder). *See also* Andersson & Boyer, *supra* note 21, at 3.

[24]J. Coleman, *et al.*, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966).

[25]While teachers in previous eras often viewed bilingualism as a "source of mental confusion," Carter, *supra* note 15, at 51, this notion has been effectively repudiated by a number of recent studies. One of them, with careful controls for sociocultural factors, found that "bilinguals perform significantly better than monolinguals on both verbal and non-verbal intelligence tests. Several explanations are suggested as to why bilinguals have the general intellectual advantage. It is argued that they have a language asset, are more facile at concept formation, and have a greater mental flexibility." Peal & Lampert, *The Relation of Bilingualism to Intelligence*, 76 PSYCHOLOGICAL MONOGRAPHS: GENERAL AND APPLIED 1 (1962).

[26]*Bilingual Hearings*, *supra* note 17, at 54 (statement of A. Bruce Gaarder).

[27]*See* pp. 62–64 *infra*.

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B. Recent Case Law

Both the recognition of language ability as a basis of discrimination and the use of bilingual instruction as a remedy appear to be accepted. In *United States v. Texas*[28] a federal district court found that "it is largely" the "ethnically-linked traits" of "cultural incompatibilities" and "English language deficiencies"— "albeit combined with other factors such as poverty, malnutrition and the effects of past educational deprivation—which account for the identifiability of Mexican-American students as a group . . . ."[29] To remedy the unequal treatment of this group, the court ordered an extensive and detailed plan including bilingual instruction.[30]

What remains unsettled is whether courts will grant this relief where the state has provided such a group with the same instruction other children receive but the *results* are unequal. Two recent cases on this question have reached opposite conclusions.

The plaintiffs in *Lau v. Nichols*[31] were Chinese-speaking children attending public school in San Francisco. Seeking injunctive and declaratory relief against school and city officials, they alleged[32] that the failure to provide bilingual instruction to all non-English speaking children who needed it violated their rights to an education and to equal educational opportunity under the equal protection, due process, and "unenumerated rights" provisions of the Federal Constitution and under the California constitution's provision for a system of common schools.[33] They also claimed statutory rights under Title VI of the 1964 Civil Rights Act[34] and under the California Education Code. A federal district court in northern California sympathized with the plaintiffs, but concluded that they were entitled only to "the same education made available on the same terms and conditions to the other . . . students in the San Francisco Unified School District."[35]

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[28]342 F. Supp. 24 (E.D. Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972).

[29]342 F. Supp. at 26.

[30]*Id.* at 28–38. The discriminatory impact of a uniform language requirement was also recognized in Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926), in which the Supreme Court struck down a Philippine statute requiring all account books to be kept in English, Spanish, or a local dialect. It found that the provision discriminated against Chinese businessmen. *Id.* at 528.

[31]Lau v. Nichols, Civil No. C-70, 627 LHB (N.D. Cal., May 26, 1970), *aff'd*, 483 F.2d 791 (9th Cir.), *rehearing en banc denied*, 483 F.2d 805, *cert. granted*, 93 S. Ct. 2786 (1973).

[32]Complaint, Lau v. Nichols, Civil No. C-70, 627 LHB (N.D. Cal., May 26, 1970).

[33]CALIF. CONST. art IX, § 5.

[34]42 U.S.C. §§ 2000d—2000d-4 (1970). For a more detailed discussion of the statute, see pp. 62–63 *infra*.

[35]Order, Lau v. Nichols, Civil No. C-70, 627 LHB (N.D. Cal., May 26, 1970).

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On appeal, the plaintiffs emphasized their equal protection claim, but the Ninth Circuit panel, in an opinion written by Judge Trask, affirmed the district court's dismissal of the complaint.[36] The court first distinguished *Brown v. Board of Education* and its progeny as cases concerning illegitimate "affirmative state action" and "de jure discrimination."[38] It therefore rejected the argument that *Brown* applied to a claim that "the school has an affirmative duty to provide [the disadvantaged student] special assistance to overcome his disabilities, whatever the origin of those disabilities may be."[39] The opinion then noted cases in which intentional discrimination had been effected through apparently neutral policies[40] and found no "such discriminatory actions" in the case at hand.[41] Nor did the court find a third set of decisions, dealing with state activities which "perpetuated the ill effects of past de jure segregation,"[42] to be relevant. Judge Trask then stated what he saw as the underlying problem with the claim:

> Every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system. That some of these may be impediments which can be overcome does not amount to a "denial" by the Board of educational opportunities within the meaning of the Fourteenth Amendment should the Board fail to give them special attention, this even though they are characteristic of a particular ethnic group.[43]

The court recognized that "special attention" to the economic circumstances of indigent criminal defendants was required to ensure their access to the judicial system;[44] but it distinguished the case at hand on the basis that "the State's use of English as the language of instruction

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[36] 483 F.2d 791 (9th Cir.), *rehearing en banc denied*, 483 F.2d 805, *cert. granted*, 93 S. Ct. 2786 (1973).

[37] 347 U.S. 483 (1954).

[38] 483 F.2d at 794.

[39] *Id.*

[40] *Id.* at 795–96, *citing, inter alia*, Cisneros v. Corpus Christi Indep. School Dist., 324 F. Supp. 599 (S.D. Tex. 1970), *aff'd in part, modified in part, and remanded*, 467 F.2d 142 (5th Cir. 1972), *cert. denied*, 93 S. Ct. 3052 (1973).

[41] 483 F.2d at 796.

[42] *Id.* at 797, *citing, inter alia*, Gaston Co. v. United States, 395 U.S. 285 (1969); Guinn v. United States, 238 U.S. 347 (1915). *Id.* at 796.

[43] 483 F.2d at 797.

[44] *Id.* at 798, *citing, inter alia*, Mayer v. Chicago, 404 U.S. 189 (1971); Griffin v. Illinois, 351 U.S. 12 (1956).

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in its schools is intimately and properly related to the educational and socializing purposes for which public schools were established," while "the ability of a convict to pay a fine or a fee imposed by the state, or to pay a lawyer, has no relationship to the purposes for which the criminal judicial system exists."[45] Finally, Judge Trask felt that the determination of the need for a program of remedial language instruction was of such a complex nature and required such policy judgements that judicial deference was in order.[46]

In dissent, Judge Hill declared that he would recognize a denial of equal educational opportunity and "remand the case to the trial court for the taking of further evidence on defendants' justification, if any, for their failure to provide the bilingual teaching which plaintiffs seek."[47] Arguing that the equal protection clause did apply to the deprivation at issue, he stated that "the essence of education is communication" and that "when [a small child] cannot understand the language employed in the school, he cannot be said to have an educational opportunity in any sense."[48] Because the plaintiffs sought bilingual instruction only in order to learn English, he characterized the majority's assertion that English-language instruction was reasonable as a "straw man."[49] Noting that the effected classification of an ethnic minority was suspect and "presumptively illegal,"[50] Judge Hill stressed that

> [o]ne can deal with an apparently neutral and non-discriminatory statute or scheme which is applied or enforced without any intent to discriminate (or even without knowledge that the effect is a discriminatory one) and still run afoul of the Equal Protection Clause if illegal discrimination in fact results.[51]

Turning to the burden of justification placed on the state, he said that the "showing would necessarily be required to be persuasive in the extreme."[52] The dissent concluded with a rebuttal of the view that state action causing the language deficiency was necessary to support the claim, and an assertion that "[t]o ascribe some fault to a grade school child because of his 'failing to learn the English language' seems both callous and inaccurate."[53]

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[45] 483 F.2d at 798.
[46] *Id.* at 799–800.
[47] *Id.* at 801.
[48] *Id.*
[49] *Id.* at 802.
[50] *Id.* at 803.
[51] *Id.*
[52] *Id.* at 804.
[53] *Id.* at 805.

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The other major bilingual case to date, *Serna v. Portales Municipal Schools*,[54] was brought on behalf of Spanish-speaking children in a New Mexico school district. The facts in *Serna* indicated that school officials had made significant commitments to compensatory and bilingual instruction—more extensive than those of the *Lau* defendants.[55] Yet unlike the Ninth Circuit, the district court in *Serna* found that the Spanish-speaking plaintiffs did "not in fact have equal educational opportunity and that a violation of their constitutional right to equal protection exists."[56] The court based its holding on evidence of disproportionately low I.Q. scores and general performance in the one school in the system composed primarily of Spanish-surnamed pupils,[57] and on "testimony of educational experts regarding the negative impact upon Spanish-surnamed children when they are placed in a school atmosphere which does not adequately reflect the educational needs of this minority."[58] "State action" was found in "[t]he promulgation and institution of a program . . . which ignores the needs of" minority students.[59]

Both the seriousness of the need for bilingual education and the current judicial division over the constitutionality of English-only instruction suggest that the issues should be analyzed further.[60] Before proceeding to this analysis, however, it is important to note the statutory and state constitutional provisions from which the judicial branch may draw guidance.

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[54] 351 F. Supp. 1279 (D.N.M. 1972).

[55] *Id.* at 1281.

[56] *Id.* at 1282.

[57] *Id.* at 1281–82.

[58] *Id.* at 1282.

[59] *Id.* at 1283. Support for this proposition was found in the Tenth Circuit's opinion in Keyes v. School Dist. No. 1, 445 F.2d 990, 1004 (1971), *modified*, 93 S. Ct. 2686 (1973), although *Serna*'s explanation of the relevance of *Keyes* is questionable. In the course of arguing that neither an imbalance in assignment nor the fact of segregation per se necessarily results in low scholastic achievement, the Tenth Circuit stated that even a completely integrated setting does not resolve the problem if the schooling is not directed to the specialized needs of children coming from low socio-economic and minority racial and ethnic backgrounds. 445 F.2d at 1004. The court did not say that a curriculum "not tailored to their educational and social needs," 351 F. Supp. at 1282, *quoting* 445 F.2d at 1004, was a violation of the equal protection clause.

[60] In addition to the imminence of a Supreme Court decision in *Lau* as this Article goes to press, a class action which would extend the *Serna* result to New York City's Puerto Rican students is also pending. Aspira, Inc. v. Board of Educ., No. 72 Civ. 4002 MEF, (S.D.N.Y., filed Sept. 20, 1972), *motion to dismiss denied*, 58 F.R.D. 62 (S.D.N.Y. 1973). A bilingual claim was made in Morales v. Shannon, 41 U.S.L.W. 2451 (W.D. Tex., Feb. 13, 1973), but the court simply followed *Lau* without elaboration.

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II. STATUTORY BASES FOR BILINGUAL EDUCATION CLAIMS

There are two ways in which courts can employ the relevant federal and state statutes: first, as bases for finding rights and duties established by the legislature, and second, as legislative interpretation of the Constitution's demands.

A. Statutory Construction

Two federal statutes are of principal importance in this area. The first is Title VII of the Elementary and Secondary Education Act of 1965 (ESEA).[61] This act gives financial assistance to local educational agencies to develop bilingual curricula, programs designed to familiarize students with their history and culture, and plans for closer cooperation between school and home.[62] The implementing provisions of the ESEA depend upon voluntary action by state governments,[63] however; and unless a state legislature requires an official to apply for these funds, litigants cannot rely on this statute.

The second federal provision of significance is Title VI of the Civil Rights Act of 1964.[64] In broad terms, it proscribes discrimination in federally-assisted programs and activities, and the Department of Health, Education, and Welfare (HEW) has issued detailed regulations to implement this mandate.[65] Under these provisions, no school system administering a federally-funded program may employ criteria or methods of administration which have the *effect* of defeating the objectives of the program with respect to individuals of a particular national origin.[66] In 1970, HEW issued a memorandum applying this

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[61]20 U.S.C. §§ 880b—880b-5 (1970), *as amended*, 20 U.S.C.A. §§ 880b-1, 880b-3a, 880b-4, 880b-5 (Pocket Part 1973). This Act was the subject of extensive legislative hearings. *Bilingual Hearings*, *supra* note 17.

[62]Some monies for bilingual programs have also been allocated through Title I of the ESEA—the general provision for compensatory education. 20 U.S.C. § 241a (1970), *as amended*, 20 U.S.C.A. § 241a (Pocket Part 1973).

[63]Appropriations are authorized for federal matching of state funds for specified types of programs if proper application is made to the Commissioner of Education. The Commissioner may also give funds to the Secretary of the Interior for bilingual education for Indian children. *See* 20 U.S.C. §§ 880b-1—880b-4 (1970), *as amended*, 20 U.S.C.A. §§ 880b-1, 880b-3a, 880b-4 (Pocket Part 1973).

Plaintiffs in the *Aspira* case expressly disclaimed a *right* to receive federal funds. Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 11, Aspira, Inc. v. Board of Educ., No. 72 Civ. 4002 MEF, (S.D.N.Y., filed Sept. 20, 1972), *motion to dismiss denied*, 58 F.R.D. 62 (S.D.N.Y. 1973).

[64]42 U.S.C. §§ 2000d—2000d-4 (1970).

[65]45 C.F.R. Pt. 80 (1972).

[66]45 C.F.R. § 80.3(b)(2) (1972).

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standard to the problem of providing equal educational opportunity for national-origin minority group children deficient in English language skills.[67] The memorandum directed: (1) that affirmative steps be taken by state schools to include such children in normal educational processes; (2) that no classification of such children as mentally retarded, nor any exclusion of them from college preparatory courses, be effected on any basis directly related to language skills; (3) that remedial "tracking" of such children be permitted on a temporary basis only; and (4) that, where necessary, notices be issued to their parents in the parents' native language. This legislatively based mandate may make it unnecessary to reach constitutional questions where special language instruction for a national-origin minority group is denied in a federally-assisted educational institution.

The Act provides that "[c]ompliance with any requirement adopted" to carry out Title VI "may be effected" by termination of funding or other means authorized by law, provided that an attempt to secure voluntary compliance is made first.[68] In the recent case of *Adams v. Richardson,*[69] the Court of Appeals for the District of Columbia Circuit held that such an attempt does not relieve HEW of responsibility to enforce the statute if voluntary acquiescence is not forthcoming, and "[a] consistent failure to do so is a dereliction of duty reviewable in the courts."[70] This decision therefore allows private litigants to enforce Title VI and regulations thereunder by suing the Department; previous attempts to sue HEW or the offending school districts have met only limited success.[71]

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[67] 35 Fed. Reg. 11595 (1970)

[68] 42 U.S.C. § 2000d-1 (1970).

[69] 480 F.2d 1159 (D.C. Cir. 1973) (en banc), *modifying in part and aff'g per curiam* 351 F. Supp. 636 (D.D.C. 1972) *and* 356 F. Supp. 92 (D.D.C. 1973).

[70] 480 F.2d at 1163. Distinguishing this case from decisions on prosecutorial discretion, the court stated: "It is one thing to say the Justice Department lacks the resources necessary to locate and prosecute every civil rights violator; it is quite another to say HEW may affirmatively continue to channel federal funds to defaulting schools." *Id.* at 1162.

[71] Prior to *Adams*, it had been held that private litigants might challenge the decision of HEW to continue or terminate funding, but only when a decision had been made following a hearing. *Compare* Hicks v. Weaver, 302 F. Supp. 619, 620–21 (E.D. La. 1969) (HUD public housing case allowing private challenge to agency action), *with* Taylor v. Cohen, 405 F.2d 277, 281 (4th Cir. 1968), *and* Linker v. Unified School Dist. No. 259, 344 F. Supp. 1187, 1201–02 (D. Kan. 1972) (HEW educational funding cases refusing to allow white plaintiffs to interrupt agency negotiations with school board). *Taylor* and *Linker* may be distinguished from *Adams* and *Hicks* as attempts to impede agency enforcement of anti-discrimination provisions, as opposed to attempts to compel agency enforcement of such provisions.

Several cases support the proposition that private litigants have standing as "third party beneficiaries" to sue the recipients of HEW funding. *E.g.*, Lemon v. Bossier Parish School Bd., 240 F. Supp. 709, 713–15 (W.D. La.), *motion for rehearing denied*, 240 F.

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In addition to federal statutes, there is a wealth of material in every state code on state obligations with respect to public education. Several state legislatures have initiated comprehensive programs for handicapped, disabled, mentally disturbed, or otherwise disadvantaged children.[72] Since 1968, eleven states have passed laws specifically permitting school districts to provide bilingual instruction,[73] and one state—Massachusetts—has required school districts to do so.[74] In some states, moreover, statutory provisions should be viewed against the backdrop of affirmative obligations in the state constitutions, which are discussed below in Part III of this Article.[75]

B. Statutes As Sources of Constitutional Rights

Since *Katzenbach v. Morgan*[76] was decided in 1966, there has been speculation about the extent to which branches of the government other than the judiciary may interpret the Constitution in ways which are binding on, or at least highly persuasive to, the courts. In particular, interest has focused on whether Congress or the executive may enforce the equal protection clause by placing tighter restrictions on the states than judicial interpretations have demanded.[77] The *Morgan* Court upheld congressional power to pass a statute intended to secure fourteenth amendment rights as construed by Congress. The legislation in question prohibited application of an English literacy requirement for voting to persons educated in an American school using a classroom

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Supp. 743 (1965), *aff'd*, 370 F.2d 847, 850, 851–52 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); *see* Coleman v. Humphreys County Memorial Hosp., 55 F.R.D. 507, 510–11 (N.D. Miss. 1972). *Contra*, Green St. Ass'n v. Daley, 373 F.2d 1, 8–9 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967).

In Lau v. Nichols, 483 F.2d 791 (9th Cir.), *rehearing en banc denied*, 483 F.2d 805, *cert. granted*, 93 S. Ct. 2786 (1973), a private claim under Title VI was rejected because plaintiffs had not shown the *affirmative denial* of a benefit. 483 F.2d at 794 n.6. The standing of plaintiffs to raise the issue as "third party beneficiaries" was not questioned.

[72] *See generally* State-Federal Clearinghouse for Exceptional Children, TRENDS IN STATE LEGISLATION FOR THE EDUCATION OF HANDICAPPED CHILDREN (1972); Abeson, *Movement and Momentum: Government and the Education of Handicapped Children*, 39 EXCEPTIONAL CHILDREN 63 (1972); Weintraub & Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037, 1051 (1972).

[73] Kobrick, *supra* note 9, at 269.

[74] MASS. GEN. LAWS ANN. ch. 71A (Supp. 1973). This chapter provides that wherever twenty or more children of limited English-speaking ability, who speak a common native language, reside in a local school district, that district must provide full-time bilingual programs for each such language group.

[75] *See* pp. 66–71 *infra*.

[76] 384 U.S. 641 (1966).

[77] *See, e.g.*, Cox, *The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

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language other than English.[78] Although the majority declined to state whether or not the Court itself would find such application of a literacy requirement a denial of equal protection, the opinion suggests that courts should respect a legislative determination of this nature.[79]

The federal statutory provisions for bilingual education are not expressly intended to carry out the fourteenth amendment, but their enactment demonstrates Congress' determination that lack of necessary language instruction is a crippling problem for children of certain ethnic and cultural backgrounds. This finding, and the congressional and HEW actions pursuant thereto, may suggest that bilingual instruction is a sufficiently important ingredient of equal opportunity that the Constitution requires it.[80]

One commentator has suggested that if a court utilizes congressional and administrative actions in this manner, the "process may be interpreted as the judiciary's seizing upon a legislative initiative which it could not, within separation-of-powers constraints, have compelled in spite of felt claims of right, for the purpose of thenceforth securing and expanding the fulfillment of such claims."[81] As one example of such interaction, the treatment of statutory entitlements as "mere privileges" has been rejected by recent cases recognizing significant property interests in benefits voted by the legislature.[82] Thus, in applying the due process clause in *Goldberg v. Kelly*,[83] the Supreme Court held that welfare benefits could not be terminated without a prior hearing.[84] Legislative action such as that at issue in *Goldberg* may not only create interests requiring due process protection but also strengthen the argument that a court should find the benefit to be among those minimum rights which the Constitution secures. At the least, judges should not feel politically adventuresome in declaring such interests to be of constitutional stature if other departments of government have thought it wise and practicable as a matter of *policy* to foster them.[85]

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[78] 42 U.S.C. § 1973b(e) (1970).

[79] 384 U.S. at 652–56. *But see* Oregon v. Mitchell, 400 U.S. 112 (1970).

[80] *See* Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 1013 (1973) [hereinafter cited as *Welfare Rights*].

[81] *Id.* at 1014.

[82] *E.g.*, Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970).

[83] 397 U.S. 254 (1970).

[84] *Id.* at 264.

[85] There are at least two reasons why legislative and executive enactments deserve attention and deference from courts. First, although the judiciary may be charged with a special duty to interpret the Constitution, all the branches have a coequal duty to uphold it; even on questions of law, the considered judgment of the other branches carries great intellectual—and, as a pragmatic matter, political—weight. Second, deference should be

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It may be argued that such reliance by the courts would deter legislators from acting for fear that their enactments will be mistaken for constitutional interpretations. The legislature is, however, always free to qualify its actions in order to limit their effect, and it is not expected that courts will be overzealous in weaving constitutional requirements out of legislative and executive actions.

III. THE RIGHT UNDER STATE CONSTITUTIONS

In addition to the uses of statutory provisions discussed in Part II, other grounds for bilingual education claims—short of federal constitutional interpretations yet potentially supporting them—may be found in state constitutions. Indeed, as stated by the Supreme Court of New Jersey in a recent school financing case, "a State Constitution could be more demanding" than federal provisions.[86] A stricter standard of equal educational opportunity could result, for example, from interpretation of the state's version of the equal protection clause.[87] More likely, as in the New Jersey case, it would stem from a specific state constitutional provision for public education.[88] Many of the state provisions are similarly phrased, and they may be categorized into four groups.

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accorded the peculiar institutional competences of the legislature and executive to analyze and digest a wide range of data and reach broad-based conclusions of *fact* not attainable through the ordinary judicial case-and-controversy process. Where those branches have clearly determined that educational deprivation suffered by non-English speaking school children as a result of language barriers is a widespread and serious threat to citizen development, and have determined as a matter of fact that present state school programs are inadequate in this respect, there is less need for a court to rest its own decisions on what might be a "possible" or "rational" system under the Constitution.

The opinion has been expressed that taking advantage of federal assistance should increase a state's affirmative duty to ensure the protection of constitutional rights. *See* United States v. Texas, 330 F. Supp. 235, 250 (E.D. Tex.), *remedy modified,* 447 F.2d 441 (5th Cir. 1971). There have been some excellent analyses of statutory claims—and the appropriate judicial responses—in cases where plaintiffs' standing was challenged. *E.g.*, Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968).

[86] Robinson v. Cahill, 62 N.J. 473, 490, 303 A.2d 273, 282 (1973), *cert. denied,* Dickey v. Robinson, 42 U.S.L.W. 3237, 3246 (U.S. Oct. 23, 1973).

[87] In Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), decided before the Supreme Court upheld Texas's system of school finance against an equal protection challenge in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), the California Supreme Court held that the state's system of educational funding violated the equal protection guarantees of both the federal and state constitutions. *See also* Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972), *rehearing granted,* 41 U.S.L.W. 2424 (Mich. Sup. Ct., Feb. 13, 1973).

[88] *See* Robinson v. Cahill, 62 N.J. 473, 513–21, 303 A.2d 273, 294–98 (1973), *cert. denied,* Dickey v. Robinson, 42 U.S.L.W. 3237, 3246 (U.S. Oct. 23, 1973).

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A. "Weak" Provisions

The first group consists of state constitutions with "weak" provisions: those with an explicit but unelaborated commitment. New York's clause fits in this category, providing simply that "[t]he Legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this State may be educated."[89] The Connecticut constitution states, similarly, that "[t]here shall always be free public elementary and secondary schools in the state. The General Assembly shall implement this principle by appropriate legislation."[90] The education clauses in the Alabama, Kansas, and Oklahoma constitutions are almost identical to Connecticut's.[91] Those of Alaska, Hawaii, and Utah have only added a proscription against "sectarian control."[92] North Carolina's provision speaks in terms of forever encouraging the means of education, and Vermont's is similar.[93] South Carolina's constitution apparently lacks an explicit mandate, although it establishes a Board of Education and Superintendency of Public Instruction.[94]

Despite the simplicity of these provisions, they are substantive state obligations written in the most fundamental body of state law. A Connecticut court recently held that the state's constitutional commitment to education provided the basis for a suit on behalf of children deprived of the "full benefits" of state schooling.[95] And a federal court has held that New York's constitution guaranteed all children a "valuable right to a public school education" which should not be "invaded or denied . . . without the proper safeguards of procedural fairness."[96]

B. "Thorough and Efficient Systems"

The next category includes at least a dozen state constitutions which require the "maintenance and support of a thorough and efficient system

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[89]N.Y. CONST. art. XI, § 1.

[90]CONN. CONST. art. VIII, § 1.

[91]ALA. CONST. art. 14, § 256; KAN. CONST. art. 6, § 1; OKLA. CONST. art. XIII, § 1. The Alabama constitution does, however, retain a reference to state aid for racially segregated schools.

[92]ALAS. CONST. art. VII, § 1; HAWAII CONST. art. 9, § 1; UTAH CONST. art. X, § 1.

[93]N.C. CONST. art. 9, § 1; VT. CONST. ch. 2, § 64.

[94]S.C. CONST. art. XI, § 1.

[95]Sherman v. Kemish, 29 Conn. Sup. 198, 279 A.2d 571 (Super. Ct.), *application for expedited appeal denied,* 161 Conn. 564, 287 A.2d 739 (1971).

[96]Madera v. Board of Educ., 267 F. Supp. 356, 371 (S.D.N.Y.), *rev'd on other grounds,* 386 F.2d 778 (2d Cir. 1967), *cert. denied,* 390 U.S. 1028 (1968). *But see* Serrano v. Priest,

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of free public schools."[97] Some contain such additional words as "general, uniform, and thorough."[98] The utility of such provisions for equal education litigants was demonstrated by the New Jersey Supreme Court's reliance on a like clause in that state's constitution to invalidate an uneven system of school financing.[99] "[I]t may be doubted that the thorough and efficient system of schools required by the 1875 amendment can realistically be met by reliance on local taxation," the court concluded, for "[t]he discordant correlations between the educational needs of the school districts and their respective tax bases suggest any such effort would likely fail . . . ."[100]

C. "All Suitable Means" and Purposive Preambles

The third group of state constitutional provisions is quite close to the second, but two characteristics make the textual commitment to education stronger. One feature is the appendage of additional mandates to the "thorough and efficient" language. For example, in South Dakota the legislature is required "to adopt all suitable means to secure to the people the advantages and opportunities of education."[101] California, Indiana, and Nevada also append "all suitable means" clauses to their provisions for a program of public schools,[102] and the constitutions of Rhode Island and Wyoming contain comparable phrases.[103]

Preambles in this third group of constitutions further strengthen claims for equal educational opportunities. Some emphasize the relationship between education and the exercise of basic rights,[104] lending

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5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (provision for "a system of common schools" held not to require uniform educational expenditures).

[97]N.J. CONST. art. VIII, § 4. The following contain similar provisions: COLO. CONST. art. IX, § 2; FLA. CONST. art. 9, § 1 (in addition to requiring a "uniform system" of schools, this section calls for "other . . . programs that the needs of the people may require"); IDAHO CONST. art. IX, § 1; MD. CONST. art. VIII, § 1; MINN. CONST. art. VIII, § 1 ("general and uniform"); MONT. CONST. art. XI, §1 ("general, uniform, and thorough"); OHIO CONST. art. VI, § 2 ("thorough and efficient"); PA. CONST. art. III, § 14; TEX. CONST. art. VII, § 1; VA. CONST. art. VIII, § 1; W. VA. CONST. art. XII, § 1.

[98]IDAHO CONST. art. IX, § 1; *see* note 97 *supra.*

[99]Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied,* Dickey v. Robinson, 42 U.S.L.W. 3237, 3246 (U.S. Oct. 23, 1973).

[100]62 N.J. at 520, 303 A.2d at 297.

[101]S.D. CONST. art. VIII, § 1.

[102]CAL. CONST. art. IX, § 1; IND. CONST. art. 8, § 1; NEV. CONST. art. XI, § 1.

[103]R.I. CONST. art. XII, § 1; WYO. CONST. art. VII, § 1.

[104]*See, e.g.*, ARK. CONST. art. XIV, § 1: "Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools . . . ." *See also* CAL. CONST. art. IX, § 1: "A general diffusion of knowledge and intelligence being essential to the

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support to an argument that school programs may be subjected to close judicial scrutiny in order to safeguard fundamental liberties.[105] Preambles of other constitutions make direct commitments to the equalization of educational opportunity.[106]

D. "Paramount" and Specific Duties

Provisions in a fourth category declare such obligations more forcefully and explicitly. They include mandates at least as strong as the following from the Washington state constitution: "It is the *paramount duty* of the state to make ample provision for the education of all children residing within its borders without distinction or preference on account of race, color, caste or sex."[107] Others that read in terms of a "paramount," "fundamental," or "primary" duty are Georgia, Illinois, and Michigan.[108] Some constitutions in this category include more specific language. New Mexico's provision, for example, requires that the legislature

> shall provide for the training of teachers . . . so that they may become proficient in both the English and Spanish languages, to qualify them to teach Spanish-speaking pupils and students in the public schools and educational institutions of the state, and shall provide proper means and methods to facilitate the teaching of the English language and other branches of learning to such pupils and students.[109]

A subsequent section prohibits the segregation of children of Spanish ancestry and calls for "perfect equality."[110]

Some states which did not make such explicit commitments in their former provisions for a school system have recently added them. Thus, Illinois has provided that "[a] fundamental goal of the State is the educational development of all persons *to the limit of their capacities.*

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preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means, the promotion of intellectual . . . improvement."

[105] *See* p. 85 *infra.*

[106] MASS. CONST., ch. 5, § 2: "Wisdom and knowledge, as well as virtue . . . depend on spreading the opportunities and advantages of education . . among the different orders of the people . . . ." *See also* TENN. CONST. art. XI, § 12, for a similar preamble, with the exception that it authorizes racially segregated schools.

[107] WASH. CONST. art. IX, § 1 (emphasis added).

[108] GA. CONST. art. VIII, § I; ILL. CONST. art. X, § 1; MICH. CONST. art. VIII, §§ 1, 2. Georgia, however, still retains a racial separation clause.

[109] N.M. CONST. art. XII, § 8.

[110] *Id.* § 10.

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The State shall provide for an efficient system of high quality public educational institutions and services."[111] And Michigan now requires that "[i]nstitutions, programs, and services for the care, treatment, education, or rehabilitation of those inhabitants who are physically, mentally or otherwise seriously handicapped shall always be fostered and supported."[112]

E. General Issues in the Utilization of State Constitutional Provisions

It is possible that the constitutional provisions in all four categories were drafted not to create any "rights to education," but rather to declare the enlightened self-interest of the polity as a whole in a well-trained or well-socialized citizenry.[113] The individual beneficiaries could not then claim any state duty to educate them.

In fact, however, such provisions have been read to permit such claims by private individuals. A century ago, the California Supreme Court noted the state constitution's provision for a system of common schools and declared that

> [t]he advantage or benefit thereby vouchsafed to each child, of attending a public school is, therefore, one derived and secured to it under the highest sanction of positive law. It is . . . a right, a legal right . . . and as such it is protected . . . by all the guarantees by which other legal rights are protected. . . .[114]

More recently, a group of citizens including residents, taxpayers, and municipal officers brought the suit in which the New Jersey Supreme Court relied upon the "thorough and efficient" clause of the New Jersey constitution as the ground for invalidating the state's school financing

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[111]ILL. CONST. art. X, § 1 (emphasis added). The Committee on Education explained the purposes of the new wording as follows: "The educational enterprise greatly benefits the individuals whose vocational skills are enhanced, whose cultural levels are lifted, and whose abilities for useful service are enlarged . . . . Further, the objective that all persons be educated to the limits of their capacities would require expansion beyond traditional public school programs." Comment following ILL. CONST. art. X, § 1 (Smith-Hurd 1971), *quoting* Committee on Education.

[112]MICH. CONST. art. VIII, § 8. Michigan's clause represents a change from an earlier version which referred only to "deaf, dumb, blind, and feeble-minded or insane." The revision was needed because the previous clause was "too restrictive in scope." Comment following MICH. CONST. art. VIII, § 8 (J. Rice ed. 1965).

[113]Conversation with Prof. Frank Michelman in his constitutional law seminar at Harvard Law School, May 2, 1973.

[114]Ward v. Flood, 48 Cal. 36, 50 (1874). *See also* Miller v. Dailey, 136 Cal. 212, 68 P. 1029 (1902); Tape v. Hurley, 66 Cal. 473, 6 P. 129 (1885).

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system.[115] It thus appears that litigants may point to state constitutional provisions in arguing that the state has an affirmative obligation to educate its citizens.

In the absence of express commitments, however, it may be argued that claims based on state constitutions alone will not induce the courts to order "effective" education for all disadvantaged groups.[116] In this view, the normal reading of state clauses will be that the majority of citizens must be satisfied and that all children must have a right of access. However, the fact that a substantial number of states have raised some form of affirmative obligation to constitutional status should make courts more receptive to federal constitutional claims than they would be without such mandates for guidance. Unlike the Supreme Court's abortion decision,[117] for example, a court need not overturn the basic policies of the other tier of the federal system in the process of upholding a claim for bilingual education under the relevant federal provisions. Whether the courts should in fact uphold such a claim depends upon the applicability of the equal protection and due process clauses.

IV. FEDERAL CONSTITUTIONAL RIGHTS: EQUAL PROTECTION

A. Establishing Discrimination

The first major problem in building the equal protection argument for bilingual education is to trigger application of a theory of equality that focuses on the consequences rather than on the intent or structure of governmental activity. For the inequality of an English-only educational program is in the consequence of offering identical instruction to children with differing linguistic ability to absorb it. The effect is to give something useful to those who can speak English while giving little or nothing of worth to those who cannot. Traditionally, the courts have found a denial of equal protection of the laws only where the state has made *different* provisions for similarly situated citizens without adequate justification.[118] The doctrine has been applied to covert

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[115] Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, Dickey v. Robinson, 42 U.S.L.W. 3237, 3246 (U.S. Oct. 23, 1973).

[116] *Welfare Rights*, *supra* note 80, at 1013.

[117] Roe v. Wade, 410 U.S. 113 (1973).

[118] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972)(voter registration open only to citizens meeting durational residency requirement); Levy v. Louisiana, 391 U.S. 68 (1968) (wrongful death damages available only to legitimate children of deceased); Yick Wo v. Hopkins, 118 U.S. 356 (1886)(laundry licenses denied to Chinese but not non-Chinese applicants). *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1170–77 (1969) [hereinafter cited as *Developments—Equal Protection*].

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as well as explicit line-drawing.[119] But only in relatively recent decisions has attention been directed to the different consequences of state activity where no differentiation in provisions is made and there is no evidence of wrongful discriminatory intent. It is not questioned that the government *can* discriminate among citizens according to individual characteristics, such as language ability, when it has a rational justification for doing so.[120] But the circumstances in which the equal protection clause *compels* it to do so remain to be precisely defined.[121] The first stage of an equal protection case for bilingual education thus requires (1) the articulation of a particular theory of equality, (2) a demonstration that this theory has been recognized by the Supreme Court, and (3) an explanation of this recognition which supports extending it to the case at issue. The argument can then proceed to the second principal hurdle, determining and applying appropriate standards of judicial review.

1. The Proportional or Consequential Theory of Equality[122]

It is important to delineate the concept of equality that underlies traditional applications of equal protection doctrine. The implication in this body of case law is that the equal protection guarantee is satisfied if everyone receives an identical quantity of some benefit or suffers a quantitatively identical burden.[123] Thus if the state were to give each citizen five dollars a year, it would be said that the law was protecting all citizens equally. A similar conclusion would be reached if the legislature were to charge each applicant a fee of five dollars to obtain a governmental service.[124]

From this perspective, none of the children in a classroom where all receive one course of instruction from one teacher could suffer a

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[119] *See* Hill v. Texas, 316 U.S. 400 (1942) (juror selection); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (laundry licenses).

[120] *See Developments—Equal Protection, supra* note 118, at 1177.

[121] *See* pp. 74–78 *infra*. "The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford." Douglas v. California, 372 U.S. 353, 362 (1963) (Harlan, J., dissenting).

[122] This section is adapted directly from *Developments—Equal Protection, supra* note 118, at 1159–92.

[123] "Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent. Yet I take it that no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purchase of water from a municipal corporation, to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses." Douglas v. California, 372 U.S. 353, 361–62 (1963) (Harlan, J., dissenting).

[124] *See Developments—Equal Protection, supra* note 118, at 1165–66, 1171–72.

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denial of equal protection. The governmental output for each student is not only similar to that for all the others; it is the very same. An equal protection claim here is susceptible to the same criticism articulated by Justice Harlan in his dissent in *Griffin v. Illinois*.[125] That case held that the cost of trial transcripts required for an appeal must be waived for indigent criminal defendants. In Justice Harlan's view,

> [t]he Court thus holds that . . . the Equal Protection Clause imposes on the States an affirmative duty to lift the handicaps flowing from differences in economic [linguistic] circumstances. That holding produces the anomalous result that a constitutional admonition to the States to treat all persons equally means in this instance that Illinois must give to some what it requires others to pay for [learn themselves]. Granting that such a classification would be reasonable, it does not follow that a State's failure to make it can be regarded as discrimination. It may as accurately be said that the real issue in this case is not whether Illinois *has* discriminated but whether it has a duty *to* discriminate.[126]

There is, however, a coherent alternative theory of equal protection according to which Illinois had indeed discriminated.[127] This theory recognizes that as long as human characteristics are infinitely variable, no course of action or process can affect all men equally *in all respects*. The "numerical"[128] theory set out above tests for equality by focusing upon the structure of the government's distribution of benefits or burdens. This test is appropriate if all men are to be regarded as identical units. The alternative— "proportional" equality[129]—focuses upon the consequences of a governmental program or procedure in light of its goal. Thus a program for distributing tickets to entertainment events that achieved the *consequence* of satisfying everyone's interests equally would necessarily treat citizens unequally with respect to monetary value conferred, size of the event offered, and indeed all other characteristics. On the other hand, a program that yielded the structural *output* of one ballet ticket for each citizen would not equally satisfy individual interests, but would be equal otherwise. The formal theory thus essentially disregards differences among individuals, while the consequential theory takes differences relevant to a program's goal into account.

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[125] 351 U.S. 12 (1956).

[126] *Id.* at 34–35 (Harlan, J., dissenting).

[127] *Developments—Equal Protection*, *supra* note 118, at 1166–69.

[128] *Id.* at 1165.

[129] *Id.* at 1166.

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There is nothing inherent in the phrasing of the fourteenth amendment that compels adoption of one or the other theory.[130] Equal "protection" would seem to imply more than equal "application" or a wooden "uniformity" in the administration of the laws. It is true that the clause does not guarantee equal protection absolutely, but only equal treatment at the hands of the law. But it is not implausible to suggest that this requirement may sometimes extend to the consequences of government activity, and thus in effect guarantee "equal impact of the law." To meet this standard of equality the state may indeed have to adjust its program of burdens and benefits to the differing needs of individuals.

2. Adoption of the Proportional Theory

The Supreme Court has adopted the proportional or consequential theory in four kinds of cases.[131] Beginning with *Griffin v. Illinois*[132] in 1956, certain structurally neutral procedures for obtaining appellate review of criminal convictions have been held unconstitutional because of the unequal consequences they produced. In *Griffin*, for example, presentation of a bill of exceptions or a report of the trial proceedings was necessary in order to take an appeal, and all but those convicted

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[130] *Id.* at 1068–69. "Discriminatory treatment is not constitutionally impermissible, they say, because all children are offered the same educational fare, *i.e.*, equal treatment of unequals satisfies the demands of equal protection. The Equal Protection Clause is not so feeble. Invidious discrimination is not washed away because the able bodied and the paraplegic are given the same state command to walk. . . . The great equal protection cases cannot be shrivelled to the size the majority opinion has prescribed." Lau v. Nichols, 483 F.2d 805, 806–07 (9th Cir. 1973) (Hufstedler, J., dissenting from denial of rehearing en banc). *But see* Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) [hereinafter cited as *Protecting the Poor*]. "*[I]n shaping the statement of our claim so as to fit it to the locutions of the equal protection clause, we must find an 'inequality' to complain about; and the only inequality turns out to be that some persons, less than all, are suffering from inability to satisfy certain 'basic' wants which presumably are felt by all alike.* But if we define the inequality that way, we can hardly avoid admitting that the injury consists more essentially of deprivation than of discrimination, that the cure accordingly lies more in provision than in equalization, and that the reality of injury and the need for cure are to be determined largely without reference to whether the complainant's predicament is somehow visibly related to past or current governmental activity." *Id.* at 13 (emphasis in original).

[131] This grouping is based on convenience for the present discussion; the cases have been grouped in different ways by other commentators. The grounds of decision tend to overlap from one area to the other, and the Court has been less than clear in its reasoning in all four areas. *See generally* Goodman, *De Facto Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972) [hereinafter cited as *De Facto Segregation*]; *Protecting the Poor*, *supra* note 130.

[132] 351 U.S. 12 (1956).

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of murder had to bear the cost of transcripts necessary to prepare these documents.[133] There is no question that the procedure was formally equal; the state required the same "input" from all defendants seeking review. But the Court found equality in this sense insufficient and looked directly to the relative capacity of different individuals to benefit in fact from the opportunity offered by the government. It declared that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[134] The effect of Illinois' arrangement was to give more opportunity for an appeal to those who had money than to those who were indigent, and the Court found no adequate justification for the state to "allow"[135] this distinction to result from its procedure. In response to the argument that "by its terms" the law applied "to rich and poor alike," Justice Black noted that "a law nondiscriminatory on its face may be grossly discriminatory in its operation."[136]

Justice Harlan in dissent asserted that "[a]ll that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action."[137] Justice Frankfurter, however, focused on the "ruthless *consequence,* inevitably resulting from a money hurdle erected by a State."[138] From his perspective, "[l]aw addresses itself to actualities. It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal, and that it is not Illinois that is responsible for disparity in material circumstances."[139]

Voting rights is the second area in which the Court has ruled that "[the] equality demanded by the Fourteenth Amendment"[140] is an equality in consequences. For only upon this theory could a majority of the Justices in *Harper v. Virginia Board of Elections*[141] "conclude that a State violates the Equal Protection Clause . . . whenever it makes the affluence of the voter or payment of any fee an electoral standard."[142] The reference was to Virginia's poll tax, which was accordingly held unconstitutional. More recently, in a challenge to a Texas statute

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[133] *Id.* at 13–15.

[134] *Id.* at 19.

[135] *Id.* at 17.

[136] *Id.* at 17 n.11.

[137] *Id.* at 34 (Harlan, J., dissenting).

[138] *Id.* at 23 (emphasis added)(concurring opinion).

[139] *Id. Griffin* has been reaffirmed several times. *See, e.g.,* Mayer v. Chicago, 404 U.S. 189 (1971).

[140] Douglas v. California, 372 U.S. 353, 358 (1963).

[141] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[142] *Id.* at 666.

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requiring the payment of a fee in order to enter a primary election as a candidate, the Court unanimously[143] struck down the law because "this system falls with unequal weight on voters, as well as candidates, according to their economic status."[144]

The third area in which the Supreme Court has looked to the consequences of a state program neutrally structured and neutrally administered is defined less by the interest involved than by the classification resulting.[145] In at least two cases where the impact of a state process has divided along racial lines, the Court has taken cognizance of the pattern effected.[146] As early as 1940, it noted that the exclusion of blacks from jury service would be unconstitutional even if it resulted from neutral application of the criterion of personal acquaintance with the selectors.[147] More recently, in *Wright v. Council of the City of Emporia,*[148] the Court "focused upon the effect—not the purpose or motivation"[149] of a school board's decision to separate the city's schools from the county system. It should be noted, however, that the issue was not whether the action constituted a violation of the fourteenth amendment, but rather whether "its effect would be to impede the process of dismantling a dual [segregated] system."[150] The use of result-oriented analysis in gauging the effect of a program on the implementation of a federal court order does not necessarily imply that

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[143]Justices Powell and Rehnquist took no part in the consideration or decision of the case.

[144]Bullock v. Carter, 405 U.S. 134, 144 (1972).

[145]The Court stressed the consequential classification in *Griffin* and *Harper* also, but primary concern appears to have been directed at the fundamental interests at stake. Certainly impact differentiated according to ability to pay is not generally a matter for judicial cognizance. *See Developments—Equal Protection, supra* note 118, at 1121.

[146]There may be relevant differences between a process of screening *intended* to be selective—for example, employment tests—and a process of distribution intended to treat everyone identically. This stage in the argument, however, is simply a demonstration of instances in which the Court has recognized discriminatory patterns—unnecessary to the state's purpose—which have resulted unintentionally from government activities because certain individuals' pre-existing deficiencies prevented them from deriving as much value from the governmental program or opportunity as others derived. It is thus unnecessary here to distinguish between cases of intentional screening for nonracial, noncultural purposes and cases of intended uniform distribution.

[147]Smith v. Texas, 311 U.S. 128, 132 (1940). There was a strong suggestion, however, that intentional discrimination was the cause of the exclusion. Moreover, later decisions suggest that a discriminatory effect alone is not ground for invalidating juror selection processes if the criteria utilized are legitimate. *See* Swain v. Alabama, 380 U.S. 202 (1965); Akins v. Texas, 325 U.S. 398 (1945). But even in cases in which this view has been implied, the Court has *recognized* the unequal effect without any additional showing and required the state to justify it. *See* Hill v. Texas, 316 U.S. 400 (1942).

[148]407 U.S. 451 (1972).

[149]*Id.* at 462.

[150]*Id.* at 470.

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the Court would take this approach in determining the existence of a constitutional violation.[151]

One must, therefore, turn to lower federal court decisions for a demonstration of the extent to which the consequential theory of equal protection has been applied in cases where structurally neutral state activity has effected racially discriminatory consequences. In *Chance v. Board of Examiners*,[152] a case in which the use of certain employment examinations was challenged, the Second Circuit noted that "[c]oncededly, this case does not involve intentionally discriminatory legislation, or even a neutral legislative scheme applied in an intentionally discriminatory manner."[153] "Nonetheless," the court continued, "we do not believe that the protection afforded racial minorities by the fourteenth amendment is exhausted by those two possibilities. . . . [T]he Board's examinations have a significant and substantial discriminatory impact on black and Puerto Rican applicants. That harsh racial impact, even if unintended, amounts to an invidious *de facto* classification . . . ."[154] Other cases have recognized the racially divided consequences of a government housing program,[155] intelligence and aptitude tests for school children,[156] and qualifying examinations for jury service.[157]

The lower federal court opinion most directly relevant to a bilingual claim was written in a District of Columbia desegregation case, *Hobson v. Hansen*.[158] After finding that the city schools' track system resulted in groupings correlating with income and race,[159] the district court stated:

> The evidence shows that the method by which track assignments are made depends essentially on standardized aptitude tests which, *although given on a system-wide basis, are completely inappropriate for use with a large segment of the student body. Because these tests are standardized primarily on and are relevant to a white*

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[151] Application of consequential analysis in the former case is more manageable because impeding implementation of a court order is easier to detect than a denial of equal protection.

[152] 458 F.2d 1167 (2d Cir. 1972).

[153] *Id.* at 1175 (citations omitted).

[154] *Id.* For a similar ruling in another employment examination case, see Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972). *See also* Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971).

[155] Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968).

[156] Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972).

[157] Carmical v. Craven, 457 F.2d 582 (9th Cir. 1971), *cert. denied*, 409 U.S. 929 (1972).

[158] 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[159] 269 F. Supp. at 513.

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> *middle class group of students, they produce inaccurate and misleading test scores when given to lower class and Negro students.* As a result, rather than being classified according to ability to learn, these students are in reality being classified according to their socio-economic or racial status, or—more precisely—according to environmental and psychological factors which have nothing to do with innate ability.[160]

By invalidating this use of the tests, the court required the school system to take account of the different backgrounds pupils bring to the starting line of public education.

A fourth kind of case in which the Supreme Court has required a state to recognize and remedy the non-neutral consequences of a law neutral by its terms and motivation involves interference with the exercise of a religion.[161] In *Wisconsin v. Yoder*[162] Amish parents challenged a state law requiring children to attend school until they reached the age of sixteen. They argued that meeting this requirement would destroy their culture, and that the forced change in their life style would interfere with the practice of their religion.[163] The Court agreed, noting that

> this case [cannot] be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality . . . .[164]

The parents relied solely on the first amendment, but under the "consequential" analysis underlying the case, the result could have been reached on equal protection grounds as well.[165]

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[160] *Id.* at 514 (emphasis added).

[161] These cases might simply be grouped with those in which the Court did indeed focus on an unconstitutional effect of state action undertaken with a constitutional design, but in which the Court's objection was interference with a constitutional concern other than equal protection. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (first amendment); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (fifteenth amendment). However, the religion decisions present a particularly clear example of the dangers of treating unlike individuals "equally" in all government programs.

[162] 406 U.S. 205 (1972).

[163] *Id.* at 208–13.

[164] *Id.* at 220.

[165] *Yoder* is not the first such case. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (compulsory flag salute).

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3. Equality of Consequences and the Claim for Bilingual Education

The discriminatory consequences of unilingual education in certain bilingual communities have been amply demonstrated.[166] What remains to be established is that equality of consequences is required in this context, either because of the type of governmental activity involved or because of the nature of the resulting classification. Caution in reaching such a conclusion is called for, because a government could not operate if it could not regard citizens as identical for the purposes of most programs. And courts must be wary of extending themselves into areas requiring them to formulate standards of actual equality.[167]

By analogy to the four areas defined above, however, a program of unilingual education should be tested within the conceptual framework of consequential equality. The first two areas—criminal procedure and voting rights—involve interrelationships between the citizen and the state essential to individual liberty. Allowing the state to assume that its citizens are uniformly able to participate in these relations would contradict society's broad commitment to the liberty of the individual. There is a similar contradiction when children are compelled to attend an institution for the purpose of acquiring the skills necessary to function effectively under the societal rules prescribed by the state, and are nevertheless treated by the state as equally receptive to that instruction despite the fact that they are not. Many of the reasons for requiring recognition of consequences in the third area, too, are present in the context of unilingual education. It is true that the impact of the system falls harshly along lines of national origin rather than of race, and the impetus for according special judicial attention to programs affecting blacks and whites differently may be traced to the origins of the fourteenth amendment.[168] But the broader rationale is that politically and economically weak minority groups in general may logically depend more on the judicial than on the representative branch of government.[169] Further similarities, as noted in the leading Note on the subject, are that both race and lineage are unalterable[170] and that distinctions along both lines are "usually . . . perceived as a stigma of inferiority and a badge of opprobrium."[171] Most significantly, this view accords with established legal doctrine, for two of the cases noted in this area involved

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[166] *See* pp. 54–56 *supra*.

[167] For a consideration of the policies underlying adherence to the numerical theory of equality, see *Developments—Equal Protection*, *supra* note 118, at 1165–66.

[168] *See id.* at 1068–69.

[169] *Id.* at 1125–26.

[170] *Id.* at 1126–27.

[171] *Id.* at 1127.

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discriminatory impact on Puerto Ricans.[172] The religious element in the fourth area is missing here, but the concern in *Yoder* over the unequal impact of law on a deeply rooted culture is present.[173]

One additional theme—common to most of these cases but not universal[174]—deserves special attention, for it may ultimately be the Court's touchstone for recognition of consequential impact. This nearly common denominator is the presence of a consequence that is not merely discriminatory but totally exclusionary. In *Griffin*, for example, the indigent defendant did not simply receive less benefit from the provision for appeal than would one with the money to afford a transcript—he received no benefit at all.[175] This factor may operate independently of, or in conjunction with, one or both of the criteria discussed above—the nature of the interest involved and the character of the discrimination effected. It is, in any event, arguably present in the situations giving rise to a claim for bilingual education.[176]

Some of these suggested determinants of when consequential inequality should be recognized are similar to the factors considered in determining the appropriate standards for scrutiny of discriminatory laws. The reasoning pursued to arrive at these considerations resembles that undertaken to decide if a "fundamental interest" is being infringed by the distinctions drawn, or whether the classification is "suspect."[177] But the factors weighed for the purpose of setting standards of review are not necessarily the same as those relevant to deciding the preliminary question of what *theory* of equality to employ. Indeed, there is good cause to argue that the court should allow a wider variety of considerations to trigger recognition of consequential inequality than it allows to call forth strict scrutiny. The former judgment simply decides whether or not there is any *judicially cognizable* discrimination at all. If the court concludes that neither the interests involved nor the resulting pattern of consequences requires abandoning the convenience of formal equality, then the analysis would cease at that point. If it decides that the discriminatory impact calls for recognition, the decision still leaves open the question of what burden of justification the state will bear.[178]

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[172] *See* Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968). The precise basis of discrimination in a bilingual case is language ability rather than national origin, but this fact does not alter the analysis. *See* p. 84 *infra*.

[173] An English-only school system in a linguistically divided community implicitly denigrates the non-English speaking child's language and cultural background. *See* pp. 55–56 *supra*.

[174] *See* p. 86 *infra*.

[175] *See* pp. 74–75 *supra*.

[176] *See* p. 85 *infra*.

[177] *See* pp. 83–87 *infra*.

[178] *See* pp. 81–83 *infra*.

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It is true that inequality in the consequences of an educational program may result from inequalities in housing, clothing, and nutrition as well as language ability. But these other deficiencies are not ethnically-linked, they are unrelated to the structure of an educational program, and they do not result in a total denial of educational opportunity. The classroom cannot compensate for a lack of receptivity and motivation that stems from the many sources of social and economic deprivation in society, but courses of instruction can be so designed that children can *choose* whether or not to apply themselves. Teaching only in English, without special instruction for non-English speaking children, denies them any opportunity to make this choice.

It should also be noted that the consequential inequality supporting a claim for bilingual education differs from that in de facto segregation in at least two ways. First, there is no question that the pattern effected by English-only schools is in fact unequal. Whether all-black schools, on the other hand, are inherently unequal is highly debatable.[179] More fundamentally, even if the discriminatory pattern in de facto segregation is detrimental, this effect may not stem from the government's failure to account for individual deficiencies but from societal attitudes to which the government lends no support.

The first stage in the equal protection argument for bilingual education may be restated as follows: consequential inequality is rooted in a coherent theory which has been recognized by the courts in special circumstances, and similar, narrowly definable conditions exist in the case of unilingual education in a linguistically divided community. Establishing this much, however, only carries the claim to the threshold of traditional equal protection analysis: determining and applying the appropriate standard of review.

B. Standards of Review and Their Application

1. Restrained Review

Normally, judicial scrutiny of a classificatory scheme begins with a determination of the state's purpose for the classification, and proceeds to consider the relationship between the purpose and the line of discrimination.[180] The traditional doctrine of judicial restraint suggests upholding a formally neutral program, even though it has a discriminatory impact, if there is no discriminatory intent and there is

[179] *See De Facto Segregation, supra* note 131, at 307–10.

[180] *See Developments—Equal Protection, supra* note 118, at 1076. Of course determination of purpose is itself a complex process. Discussion of this problem is beyond the scope of this Article. *See id.* at 1077–81.

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a rational relationship between the result—apart from the discriminatory by-product—and the purpose of the activity. Thus in the Second Circuit employment examination case noted above,[181] the court asserted that "the proposition to be proved was only that the Board's examinations were job-related."[182] The courts' readiness to engage in their own search for plausible legislative purposes rationally related to a law's effect has varied.[183] But in cases where they have recognized consequential inequality and adopted a restrained standard of review, they have required the *government* to articulate and demonstrate a rational relationship to purpose.[184]

In a bilingual case, the state would probably assert that current means of instruction are related to the needs of most children and that resources would have to be diverted from other purposes in order to develop a bilingual teaching capacity. This justification may be defeated, however, if it could be shown that a substantial percentage of pupils are not benefitting from their courses, and that federal funds available specifically for the needed changes would be adequate without the transfer of resources from other parts of the school system.[185]

The state might also take a different tack and argue that unilingual education is preferable for reasons of educational policy. It could point out the successful assimilation of prior generations of non-English speaking children through unilingual public schools. Overwhelming evidence, however, indicates that absorption of the culture and dominant language of this country proceeds in spite of, rather than because of,

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[181] Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972), discussed at p. 77 *supra*.

[182] 458 F.2d at 1177.

[183] *See* Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972); *Developments—Equal Protection, supra* note 118, at 1082–87.

[184] "[O]nce such a *prima facie* case was made, it was appropriate for the district court to shift to the Board a heavy burden of justifying its contested examinations by at least demonstrating that they were job-related. First, since the Board is specifically charged with the responsibility of designing those examinations, it certainly is in the better position to demonstrate their validity. Second, once discrimination has been found it would be anomalous at best if a public employer could stand back and require racial minorities to prove that its employment tests were inadequate at a time when this nation is demanding that private employers in the same situation come forward and affirmatively demonstrate the validity of such tests." Chance v. Board of Examiners, 458 F.2d 1167, 1176 (2d Cir. 1972) (citations omitted). In Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972), Judge Coffin stated the requirement as follows: "The public employer must . . . demonstrate that the means [of selection] is in fact substantially related to job performance." *Id.* at 732. Other cases in this group have also adopted a standard of review between relaxed and strict scrutiny. *See* Carmical v. Craven, 457 F.2d 582 (9th Cir. 1971), *cert. denied*, 409 U.S. 929 (1972); Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972).

[185] *See* p. 62 *supra*.

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unilingual schooling.[186] If the court requires a genuine justification for the school programs in question, it may thus find a violation of the equal protection clause even upon a restrained review of an all-English system.

2. Active Review

In cases of discrimination involving a suspect classification or a fundamental interest, the courts have placed a heavier burden of justification on the government, requiring it to show that a "compelling state interest" is at stake.[187] In such instances, a merely rational relationship between purpose and classification has been insufficient to uphold the measure in question, and decision has been based on a balancing of societal benefit against individual harm.[188]

As noted in *Chance,*[189] however, it would be improper automatically to apply this approach to cases involving unintentional discrimination.[190] Much government action affects disadvantaged groups differently than it affects other classes of citizens, and strict scrutiny could not—as a practical matter—be applied to all the cases of such differential results.[191] Moreover, discrimination is less offensive when it is not intended by the state. But in cases of consequential inequality along suspect lines *and* related to a fundamental interest, strict scrutiny should be the rule.[192] The question, then, is whether there is a suspect classification and a fundamental interest involved in a claim for bilingual education.

The most recent Supreme Court pronouncement on both elements in the context of public education is *San Antonio Independent School District v. Rodriguez.*[193] At issue was a system of school financing which yielded a smaller sum per student in some school districts than in others, depending on the yield of property taxes.[194] The Court declined to review the system with strict scrutiny because it found neither a suspect classification[195] nor a fundamental interest[196] involved. By applying the

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[186] *See* pp. 56–57 *supra.*

[187] *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[188] *See* Note, *Equal Protection and the Indigent Defendant:* Griffin *and Its Progeny,* 16 STAN. L. REV. 394 (1964) *But see* Mayer v. Chicago, 404 U.S. 189, 196 (1971) ("*Griffin* does not represent a balance between the needs of the accused and the interests of society").

[189] 458 F.2d 1167 (2d Cir. 1972).

[190] *Id.* at 1177.

[191] *Cf.* Dandridge v. Williams, 397 U.S. 471 (1970).

[192] This view is supported by the Court's approach in the indigent defendant and voting rights cases discussed above at pp. 74–75.

[193] 411 U.S. 1 (1973).

[194] *Id.* at 6–17.

[195] *Id.* at 18–28.

[196] *Id.* at 29–39.

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Court's analysis to the consequential inequality involved in a unilingual school system, it can be shown that active review is appropriate here because both factors are present.

Concerning the suspect classification doctrine, Justice Powell stated for the majority that

> [t]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[197]

He even found it difficult to define the class.[198] The group disadvantaged by an English-only educational program, on the other hand, is clear. It consists of children of certain national origins who have never learned English. Such a class in the Southwest or the ghettos of a large city does carry the indicia of suspectness articulated by Justice Powell and derived from prior case law.[199]

It may be argued, however, that because the class is not defined by national origin alone but rather—to be more precise—by language ability, these precedents do not apply. Admittedly, language skills, unlike national origin and race, can be altered, and a class defined by its spoken tongue is therefore not indelibly tagged. However, such a class may still bear the indicia of suspectness delineated in *Rodriguez*. And more broadly, the interrelationship between national origin and language in some regions is so close that separation is meaningless in practice.[200]

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[197] *Id.* at 28.

[198] *Id.*

[199] Chinese- and Japanese-Americans have long been recognized as racial minorities deserving protection under the due process and equal protection clauses. *E.g.*, Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Yick Wo v. Hopkins, 118 U.S. 356 (1886). Discrimination against Puerto Ricans in unemployment insurance was found to violate equal protection in Galvan v. Levine, 345 F. Supp. 67 (S.D.N.Y. 1972). And Puerto Ricans as well as Mexican-Americans have received judicial recognition as ethnic minorities both for purposes of equal educational opportunity, *e.g.*, Cisneros v. Corpus Christi Indep. School Dist., 467 F.2d 142 (5th Cir. 1972), *cert. denied*, 93 S. Ct. 3052 (1973); Alvarado v. El Paso Indep. School Dist., 445 F.2d 1011 (5th Cir. 1971); United States v. Texas, 342 F. Supp. 24 (E.D. Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972), and for purposes of jury selection, *e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954) (holding that persons of Mexican descent constituted a distinct class to which the equal protection guaranty was applicable). *But see* Tijerina v. Henry, 48 F.R.D. 274 (D.N.M. 1969), *appeal dismissed*, 398 U.S. 922 (1971) (district court held, in part, that class of "Mexican Americans" undefinable and therefore unsuitable for class action). A long tradition of governmental relations also gives "official" minority status to American Indians. *See* Rosenfelt, *supra* note 13.

[200] *Cf.* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969): "Defendants have not, and indeed could not have,

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With respect to fundamental interests, *Rodriguez* held that education itself does not fall within this rubric because it is not "explicitly or implicitly guaranteed by the Constitution."[201] The Court did, however, take note of the argument that there is a nexus between education and effective exercise of the fundamental interests in free speech and the franchise.[202] Justice Powell disposed of the contention by ruling that

> [w]hatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.[203]

Instruction in a language which children cannot understand must, at the very least, approach the absolute denial referred to in *Rodriguez*. The reports and studies discussed above show that non-English speaking children have little if anything to show for the years they spend in English-only schools.[204] Even if these children acquire some minimal quantum of knowledge and skills, the enduring negative attitudes fostered under these circumstances may reduce the sum total of what the school imparts to zero, or even worse than nothing.

To some extent this line of reasoning is pure speculation because Justice Powell did not elaborate upon his use of the phrase "absolute

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denied that the pattern of grouping correlates remarkably with a student's status, although defendants would have it that the equation is to be stated in terms of income, not race. However, as discussed elsewhere, to focus solely on economics is to oversimplify the matter in the District of Columbia where so many of the poor are in fact the Negroes." *Id.* at 513. The court then stated that race cannot "be ruled out." *Id.*

[201] 411 U.S. at 33–34.

[202] *Id.* at 35–36.

[203] *Id.* at 38.

[204] *See* pp. 54–55 *supra*.

"Access to education offered by the public schools is completely foreclosed to these children who cannot comprehend any of it. They are functionally deaf and mute.

. . . .

". . . [T]he language barrier . . . insulates the children from their classmates as effectively as any physical bulwarks. Indeed, these children are more isolated from equal educational opportunity than were those physically segregated blacks in *Brown*; these children cannot communicate at all with their classmates or their teachers." Lau v. Nichols, 483 F.2d 805, 805–06 (9th Cir. 1973) (Hufstedler, J., dissenting from denial of rehearing en banc).

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denial of educational opportunities." At one extreme, it may be asserted that there is no such denial as long as the state does not take steps to prevent children from learning English. On the other hand, it could be argued that a showing of the egregious statistics on underachievement, over-ageness, and dropout rates demonstrates total "failure" of the educational system, and hence absolute "denial" because no other formal educational opportunities are realistically available.[205] Some indication of Justice Powell's meaning may be drawn from his use of the phrase "absolute deprivation" as the standard for determining when discrimination according to wealth triggers strict scrutiny:

> The individuals, or groups . . . who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute benefit.[206]

Examination of prior cases concerning access to appellate review for indigent defendants reveals that denial of the opportunity to appeal was "absolute" only in the mildest sense of the word. Thus where a system was held to discriminate unconstitutionally on account of wealth because it left appointment of counsel to represent an indigent defendant within the discretion of the appellate court, a dissenting opinion pointed out that the procedure "denies to no one the right to appeal."[207] It merely made the quality of the appeal dependent upon the ability to hire an attorney in cases where the appellate court declined to appoint one.[208] If this arrangement constitutes such an absolute denial of opportunity that it reduces the right of appeal "to a meaningless ritual,"[209] surely the educational opportunity for a non-English speaking child in an English-only school must qualify for the same characterization.

Thus on the ground of its effective classification along ethnic lines *and* absolute denial of opportunities requisite to the exercise of fundamental interests, the discriminatory impact of an English-only

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[205]Private schools are unlikely to be an alternative for children coming from low-income homes.

[206]411 U.S. at 20.

[207]Douglas v. California, 372 U.S. 353, 363 (1963)

[208]Other indigent defendant cases similarly emphasize equality in the *effectiveness* of the appeal. *See* Mayer v. Chicago, 404 U.S. 189 (1971); Draper v. Washington, 372 U.S. 487 (1963); Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958). In these cases the quality of the appeal was dependent upon the defendants' ability to pay for a trial transcript if the appellate court refused to supply one.

[209]Douglas v. California, 372 U.S. 353, 358 (1963).

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educational system should be subject to active judicial review—and hence a balancing of individual and state interests. Under the rational relationship test, a court might not inquire into the monetary and policy justifications which the state would assert in support of an English-only school system. But under active review it would inquire into the validity of these assertions and require more substantial state interests to outweigh the harsh consequences suffered by non-English speaking children. Even if the imbalance might be tolerated on a short-term basis, it is not likely to be upheld where the inequality is maintained for years.[210] And when the end result of the system is to place those discriminated against at a disadvantage for the remainder of their lives, the court will be hard pressed to sustain the state's position. If it nonetheless concludes that such a school system does not deny equal protection of the law, it may yet find a deprivation of liberty without due process.[211]

V. FEDERAL CONSTITUTIONAL RIGHTS: DUE PROCESS

As in the equal protection analysis, there are two stages in applying the due process clause to the problem of unilingual schools in linguistically divided communities. The first involves establishing an infringement of liberty, and the second entails a consideration of what consequences flow from such a showing.

A. Deprivations of Liberty

Two due process liberties are denied by educational systems which compel a student to attend classes and yet fail to provide him with the linguistic skills necessary to benefit from the instruction: the intangible liberty to acquire useful knowledge, and the tangible liberty from physical confinement. Such infringements can be justified only by the showing of a substantial legitimate state interest in continuing them, and such a demonstration is unlikely in view of the uniformly detrimental effects of English-only programs.

1. Liberty to Acquire Useful Knowledge

The first of these liberties—the right to learn—has long been recognized. In 1923, the Supreme Court held in *Meyer v. Nebraska*[212]

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[210] *See Developments—Equal Protection, supra* note 118, at 1104.

[211] Only the equal protection and statutory issues are before the Supreme Court in Lau v. Nichols, Civil No. C-70, 627 LHB (N.D. Cal., May 26, 1970), *aff'd*, 483 F.2d 791 (9th Cir.), *rehearing en banc denied*, 483 F.2d 805, *cert. granted*, 93 S. Ct. 2786 (1973). Therefore, even an adverse decision will not preclude future bilingual claims based on other clauses of the Federal Constitution.

[212] 262 U.S. 390 (1923).

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that a state law prohibiting the teaching of modern foreign languages to children below the eighth grade in public or private schools violated the fourteenth amendment. The Court stated the following:

> While this Court has not attempted to define with exactness the liberty thus guaranteed [by the due process clause], the term ["liberty"] has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, *to acquire useful knowledge* . . . and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[213]

But while courts have recognized that education ranks among the most important functions of government,[214] the holdings fall short of providing a *right* to be educated by the state.[215] *Meyer* construed due process liberty to encompass the liberty to acquire knowledge, but it did not rule that the states had to provide the wherewithal.

No such broad holding is necessary, however, to support a due process right to bilingual education; *Meyer v. Nebraska* is sufficient. For where no such special instruction is provided, but the student is nonetheless compelled to attend classes, the state has not only failed to educate him. It has also prevented him from using that time "to acquire useful knowledge" elsewhere. In the typical situation, private formal schooling is not the foregone opportunity, for it is not an available option. However, the opportunity for informal education at home, at work, or in the neighborhood is curtailed by compulsory school attendance.

2. Freedom from Physical Restraint

A unilingual educational system also deprives students whose presence in school is compulsory of freedom from physical confinement.

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[213] *Id.* at 399–400 (emphasis added).

[214] *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 30 (1973); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).

[215] Despite some strong dicta in lower federal court decisions—favoring entitlements to education—and despite an increased reliance upon due process doctrine in school litigation, we are far from an outright constitutional entitlement to education. In the very recent *Rodriguez* opinion the Court not only refused to label education a fundamental interest, but reserved the question of whether "an absolute denial of educational opportunities" would be constitutionally impermissible. 411 U.S. at 37.

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It is clear that a state's interest in educating its citizens is sufficient justification for compelling children to attend school.[216] But when the education justifying compulsory attendance is not provided, school is simply reduced to confinement. Individuals are required to remain in an enclosed place for substantial lengths of time over a period of years, and they may be bodily restrained from leaving without permission. The confinement is not only real but also debilitating. Liberal and radical critics of American education have argued that today's school experience bears a grim resemblance to punitive imprisonment.[217] And if that is true for white, middle-class English-speaking children, it is true *a fortiori* for children facing a frustrating and humiliating language barrier.

Similar "physical liberty" arguments have been made on behalf of mentally ill individuals confined in hospitals and unruly juveniles placed in reformatories, both of which groups have sought judicial assistance to obtain either release or the care and treatment which would justify their confinement. One federal court has recognized that a person involuntarily committed to a mental hospital has a constitutional due process right to treatment. In *Wyatt v. Stickney,*[218] the plaintiffs brought a class action against state officials involved in the administration of an institution for voluntarily and involuntarily confined mental patients. It appeared that the hospital budget had been cut and that programs of treatment were inadequate. The court held that the involuntary inmates

> unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition. Adequate and effective treatment is

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[216]State supreme courts have uniformly upheld statutes compelling school attendance, *e.g.*, State v. Bailey, 157 Ind. 324, 61 N.E. 730 (1901), and the United States Supreme Court has indicated it considers such laws constitutional. Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1924). Both of these Supreme Court cases, however, placed limitations on the power of the state to compel attendance.

[217]*See, e.g.*, I. Illich, DESCHOOLING SOCIETY (1971); C. Silberman, CRISIS IN THE SCHOOLROOM (1971); Gintis, *Towards a Political Economy of Education: A Radical Critique of Ivan Illich's DESCHOOLING SOCIETY*, 42 HARV. ED. REV. 70 (1972).

[218]Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala.), *further orders*, 334 F. Supp. 1341 (1971), 344 F. Supp. 373, 344 F. Supp. 387 (1972), *appeal docketed sub nom.* Wyatt v. Aderholt, No. 72-2634, 5th Cir., Aug. 1, 1972. *Contra*, New York Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) (mem.); Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972), *appeal docketed*, No. 72-3110, 5th Cir., Aug. 1, 1972. For a note on the subject, see 86 HARV. L. REV. 1282 (1973).

The argument accepted in *Wyatt* had been advanced for years but never decided. *See* Humphrey v. Cady, 405 U.S. 504, 514 (1972); Rouse v. Cameron, 373 F.2d 451, 453 (D.C.

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> constitutionally required because, absent treatment, the hospital is transformed "into a penitentiary where one could be held indefinitely for no convicted offense."[219]

Wyatt is being appealed, and other courts have rejected its rationale.[220] But if *Wyatt* is correct, it is logical to substitute "education" for the word "treatment" in the language quoted. Adequate education is as important for preventing the transformation of schools into penitentiaries as adequate treatment is in mental hospitals.

Two recent cases have found that juveniles detained on non-criminal grounds in state institutions have a similar right to treatment.[221] *Martarella v. Kelly*[222] involved a challenge to New York's detention of "Persons In Need of Supervision" (PINS)—a class of juveniles who were neither delinquent nor "neglected," but rather confined for such problems as uncontrollable behavior and truancy. The court canvassed recent Supreme Court cases that "indicated markedly increased solicitude for the rights of children,"[223] and held that "[w]here the state, as *parens patriae*, imposes such detention, it can meet the Constitution's requirement of due process and prohibition of cruel and unusual punishment if, and only if, it furnishes adequate treatment to the detainee."[224] Similarly, *Inmates of Boys' Training School v. Affleck*[225] granted injunctive relief against certain practices of a juvenile corrections institution and ordered an increase in remedial services. The court stated: "Rehabilitation, then, is the interest which the state has defined as being the purpose of confinement of juveniles. . . . Thus, due process in the juvenile justice system requires that the post-adjudicative stage of institutionalization *further* this goal of rehabilitation."[226]

Cir. 1966); Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1960) (Fahy, J., concurring).

[219] 325 F. Supp. at 784 (citations omitted), *quoting* Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1960) (Fahy, J., concurring).

[220] *See* note 218 *supra*.

[221] These decisions were foreshadowed by statements in several prior cases. *See, e.g., In re* Gault, 387 U.S. 1, 22 n.30 (1967); Haziel v. United States, 404 F.2d 1275, 1280 (D.C. Cir. 1968); Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967); Clayton v. Stone, 358 F.2d 548 (D.C. Cir. 1966) (separate opinion of Bazelon, C.J.); Elmore v. Stone, 355 F.2d 841 (D.C. Cir. 1966) (separate opinion of Bazelon, C.J.); Sas v. Maryland, 334 F.2d 506, 517 (4th Cir. 1964), *cert. dismissed as improvidently granted*, Murel v. Baltimore City Crim. Ct., 407 U.S. 355 (1972); Kautter v. Reid, 183 F. Supp. 352, 354–55 (D.D.C. 1960); White v. Reid, 125 F. Supp. 647, 650 (D.D.C. 1954); *cf.* Jones v. Wittenberg, 323 F. Supp. 93, 100 (N.D. Ohio 1971).

[222] 349 F. Supp. 575 (S.D.N.Y. 1972).

[223] *Id.* at 599, *citing In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966).

[224] 349 F. Supp. at 585.

[225] 346 F. Supp. 1354 (D.R.I. 1972).

[226] *Id.* at 1364. In discussing the institutions' educational offerings, the court noted that "there is a bitterly cruel irony in removing a boy from his parents because he is truant

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Children in schools are deprived of physical liberty in much the same way that mental patients and unruly juveniles are confined in other institutions. It is true that their confinement is of less sustained and more defined duration, but due process should still demand that they be given the education which justifies their compelled attendance. To paraphrase *Wyatt v. Stickney*, "[t]o deprive any person of his or her liberty upon the altruistic theory that the confinement is for humane [educational] reasons and then fail to provide adequate [education] violates the very fundamentals of due process."[227] Non-English speaking children in schools which do not offer bilingual education are not receiving an education which justifies their confinement.[228]

B. The State's Options

The conclusion reached in the preceding section leaves the state two options: provide bilingual education, or exempt non-English speaking children from compulsory attendance laws. It may appear that the latter alternative would be less expensive and therefore more attractive to state legislators. But this option could be more burdensome and costly than the former because procedural due process would require that any such exemption from compulsory school attendance laws be implemented through an expensive and time-consuming process of individual hearings.

Two recent cases indicate that, before a state can exclude handicapped children from regular classes, it must afford each child a hearing on the propriety of the initial exclusion, and subsequent hearings to review periodically the continued validity of the exclusion. In *Mills v. Board of Education*,[229] a federal district court enjoined the exclusion of retarded or disturbed children from regular classes unless alternative education was provided at public expense. The right to alternative education was a statutory one; but due process was held to require a hearing before the classification of a child as either retarded or disturbed, and periodic hearings to review that classification.[230] In the similar case of *Pennsylvania Association for Retarded Children v. Pennsylvania (PARC)*,[231] a three-judge federal panel permanently enjoined analogous

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from school, and then confining him to a small room, without exercise, where he gets no education. . . . Whether education is a fundamental right . . . or not, I find that denying education to inmates of Annex C does not serve any permissible interest." *Id.* at 1369.

[227] In the opinion the bracketed words are "therapeutic" and "treatment," respectively. 325 F. Supp. at 785.

[228] *See* pp. 53–57 *supra*.

[229] 348 F. Supp. 866 (D.D.C. 1972). *See* Herr, *Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded*, 23 SYRACUSE L. REV. 995, 996 (1972).

[230] 348 F. Supp. at 875–76.

[231] 343 F. Supp. 279 (E.D. Pa. 1972) (three-judge court).

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stigmatizing classifications, pursuant to a stipulated consent agreement including a provision for notice and hearing prior to a change in educational status.[232]

The exclusion of non-English speaking children from compulsory attendance laws is not, of course, the full equivalent of excluding them from regular classes. Such a distinction is a technical one at best, however, for it overlooks the fact that children who cannot benefit from classes are unlikely to attend voluntarily. Moreover, the *PARC* opinion suggests that the primary factor which would have triggered a right to a hearing in that case, had there not been a consent decree, was the fact that—by using the derogatory adjective, "retarded"—the state stigmatized the excluded children.[233] A waiver of compulsory attendance laws for non-English speaking children is similarly derogatory, because each such child would be set apart as unsuitable for ordinary education. Educators might argue that inability to speak English is neither a permanent nor a demeaning disability; but the Supreme Court has recently held that a hearing is required by the due process clause prior to the application of a label which might be interpreted, however incorrectly, as a stigma.[234] Thus, in order to meet the requirements of the fourteenth amendment, educators must either provide bilingual education to non-English speaking children or exempt these children from compulsory school attendance laws, providing individual hearings to determine which children belong in the "non-English speaking" category.[235]

VI. CONCLUSION: A READY AND ACCEPTABLE REMEDY

Reluctance to recognize a deprivation of equal protection and due process when a state fails to structure its educational program to ensure accessibility for different linguistic groups may stem in the end from concern that other consequential deprivations cannot be distinguished.[236] The preceding sections have attempted to sketch doctrinal parameters which the courts could employ to prevent the gate for claims based on social and economic disadvantages from opening too wide. The first

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[232] *Id.* at 303.

[233] *Id.* at 294–95.

[234] Wisconsin v. Constantineau, 400 U.S. 433, 436 (1972) (regardless of whether label of "excessive drinking" denotes fault or merely illness, some will interpret it as the former and a prior hearing is therefore required).

[235] The issue of what procedural safeguards must be afforded at such a hearing is a major one, but is beyond the scope of this Article. *See* Note, *Due Process in Placement Hearings for the Mentally Retarded*, 41 GEO. WASH. L. REV. 1033 (1973). For present purposes it is sufficient to note that such requirements will increase the cost of this option.

[236] *See* pp. 58, 80 *supra*.

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section revealed the peculiar severity and clarity of the injuries caused by lack of effective language instruction for non-English speaking children. In conclusion it should also be noted that the remedy is unusually ready and acceptable.[237]

The two most important concerns that arise when formulating a remedy in a case of this nature are entanglement in local policy decisions, and imposition of unreasonable demands on limited financial resources. A directive to provide bilingual instruction in order to improve language skills is, however, a remedy easily defined and widely recommended by experts.[238] By way of comparison, it does not entail the difficult judgments in redrawing lines for school attendance zones[239] or voting districts[240] or evaluating such value-laden school policies as the daily flag salute.[241] With respect to financial limitations, it has been held that the state's

> interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the [school system] whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.[242]

The cost of providing improved language instruction, moreover, would probably be less than the costs entailed in the far-reaching desegregation orders of recent years.

The traditional concerns over involvement in policy judgments and problems of financing should also be alleviated by the existence of the HEW guidelines[243] and a growing body of experience with bilingual programs. Referring to standards of court-supervised desegregation, the Fifth Circuit has declared that "the HEW [Title VI] Guidelines are

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[237] A full analysis of the issues involved in remedies requiring affirmative action is beyond the scope of this Article. The purpose of this section is merely to demonstrate the relative simplicity of the remedy in a bilingual case. For a treatment of judicial remedies in equal protection cases generally, see *Developments—Equal Protection, supra* note 118, at 1133–59.

[238] *See* p. 57 *supra*.

[239] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[240] *See* Baker v. Carr, 369 U.S. 186 (1962).

[241] *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[242] Mills v. District of Columbia Bd. of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972).

[243] *See* pp. 62–63 *supra*.

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belated but invaluable helps in arriving at a neutral, principled decision consistent with the dimensions of the problem, traditional judicial functions, and the United States Constitution."[244] Existing bilingual projects have demonstrated that the problems of implementation can be overcome. Affirmative recruitment and training programs have expanded the pool of qualified bilingual teachers.[245] Voluntary admissions policies respect the prerogative of parents not to enroll their children in the bilingual classes, and the option of withdrawing children from the programs has been made available as well.[246] These arrangements have attracted some avid Anglo participants.[247] Focusing on the early primary grades, moreover, alleviates the need for an extensive separate program in the later elementary school years.[248]

Thought and concrete planning have been devoted to the bilingual education movement. The judicial role would thus not be to evaluate alternative proposals, but rather to recognize a right and a deprivation, and require school officials to take the appropriate remedial action. Courts should retain jurisdiction so that school authorities remain accountable; but continuing involvement in the administration of school affairs should not be necessary. Bilingual programs are not abstract proposals for use in the best of all possible worlds. They are necessary and practicable concomitants of equal educational opportunity in this frequently inadequate world.

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[244]United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 849 (5th Cir. 1966), *aff'd on rehearing*, 380 F.2d 385 (en banc), *cert. denied*, Caddo Parish v. United States, 389 U.S. 840 (1967).

[245]Northern California has launched a major effort under the Bay Area Bilingual Education League (BABEL), and numerous bilingual teachers, psychologists, administrators, etc., are being trained. Interview with Olivia Martinez, June 20, 1972. *See also* Note, *Beyond the Law to Equal Educational Opportunities for Chicanos and Indians*, 1 N.M.L. REV. 335 (1971).

[246]V. John & V. Horner, EARLY CHILDHOOD BILINGUAL EDUCATION 28–29 (1971). *See also* Gaarder, *Teaching the Bilingual Child: Research, Development and Policy*, in EDUCATING THE MEXICAN AMERICAN 262 (H. Johnson & W. Hernandez eds. 1971).

[247]*Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 307, 387 (1972) [hereinafter cited as *Chicano School Segregation*]; Wall St. J., Dec. 15, 1972, at 1, col. 1.

[248]One prescriptive version of a bilingual program is the following: "The curriculum at the elementary level would begin with basic instruction in the child's native tongue for all participating children. Morning sessions in language arts, social studies, math, and science would be taught in the student's primary language. Knowledge in these areas would then be reinforced in the second language during the afternoon. Music, art, and physical education would be required integrated activities from first to sixth grade. After the third grade, classes would be increasingly integrated. Subject matter would be presented in either language, depending on which best suits the lesson plan. . . .

"The ultimate goal of such a program would be to equip each child by the sixth grade, with sufficient linguistic knowledge of both [languages] to succeed in either language. . . ." *Chicano School Segregation*, *supra* note 247, at 390.